Brigadier Industries Corporation *and* Amalgamated Clothing Textile Workers Union, AFL-CIO, CLC. Case 10-CA-18579

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 22 April 1983 Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating employee Paul Johnson about his union activities. He also concluded that the Respondent violated Section 8(a)(3) and (1) by issuing a warning to and subsequently discharging employee Johnson. The Respondent has excepted to the judge's findings. We find merit in the exceptions.

The credited and uncontroverted evidence, as more fully set forth in the judge's decision, is as follows.

Employee Paul Johnson played an active role in the Union's organizing campaign at the Respondent's plant. His activities included handing out union literature, attending union meetings, and soliciting and encouraging fellow employees to sign union authorization cards.

On 5 May 1982[1] Johnson was called into Plant Manager Jonathan Capece's office. In the meeting Capece, according to his credited testimony, stated:

> Paul I've been told by several people that you're engaging in Union activities here at the plant. You're passing out Union literature. I don't particularly sympathize with you but I don't have anything against it. You can do that. But you've got to do it during the times that I specified and I specified the times . . . before work, after work, during break, during lunch. And he could do so in the plant. . . . I wrote him up, gave him the opportunity to sign it; he refused to sign it. I said, Okay Paul. Go back to work.[2]

Thereafter, on 12 May, Capece again received reports from his group leaders that Johnson was wandering into work areas during working time and passing out union literature. Capece then reminded Johnson that he should pass out literature "before working hours, during break, during lunch, and after working hours."[3]

On arriving at work on 26 May Johnson was told by Capece to report to the metal department. According to the credited testimony of employee Wayne McMillan, Johnson approached him about 9:30 a.m. and began a discussion about the Union.[4] Johnson and McMillan talked for a short period of time.

A short time after the Johnson-McMillan conversation, one of Capece's line foremen approached Capece and stated that a couple of employees had informed him (line foreman) that one of them had been solicited by Johnson to sign a union card and attend a meeting. Capece then asked the two employees (Oglesby and McMillan) what had happened and if they would give a statement. In Capece's view Johnson's conduct constituted a flagrant violation of his warnings of 5 and 12 May.

1. The judge found that Capece's 5 May statement to Johnson (i.e., "I've been told by several people that you're engaging in union activities here at the plant. You're passing out union literature") constituted an unlawful interrogation. We disagree. Capece's statement was made to an open and active union supporter (Johnson) and did not seek any response. The "interrogation" was not accompanied by any unlawful threats. In this circumstance Capece's remarks were clearly noncoercive and not violative of Section 8(a)(1) of the Act.

2. The judge further found that the 5 May warning issued to Johnson and the 26 May discharge of Johnson violated Section 8(a)(3) and (1) of the Act.

As to the warning, the judge noted that its wording and the accompanying restrictions that Capece imposed on Johnson were, standing alone, lawful. However, noting that the restrictions were

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[1] All dates are 1982 unless otherwise specified.

[2] Capece issued a written warning dated 5 May. It stated:

> You are hereby warned that any union activity you are engaged in can not be done during working hours. Can only be accomplished during breaks, lunch, before and after production.

[3] As the 12 May conversation was not alleged to have violated the Act, the judge made no specific finding regarding the conversation. However, it is clear that he credited Capece's testimony as to the conversation.

[4] McMillan testified that Johnson stopped him as McMillan was going to the water fountain. Johnson asked if he was going to a union meeting that night, if he had signed a union card, and whether he wanted to sign a union card. McMillan testified he was not working at the time he spoke with Johnson. Oglesby testified that he overheard the McMillan-Johnson conversation about the Union, and he corroborated McMillan's version of the conversation. Oglesby further testified that he reported the conversation to his line foreman. Finally both Oglesby and McMillan acknowledged that they confirmed to Capece that Johnson had discussed the Union with McMillan.

announced immediately after Johnson started handbilling for the Union, the judge reasoned that the Respondent was unlawfully motivated in announcing the restrictions.[5] He concluded that the Respondent's purpose was to defeat the Union and interfere with its employees' Section 7 rights. Thus, according to the judge, the 5 May warning was based on an invalid rule and therefore unlawful.

Similarly, in regard to Johnson's discharge, the judge found that the Respondent was unlawfully motivated. In so finding, the judge stated:

> In the absence of a valid no-solicitation rule, as in the instant case, employees are protected in their discussions regarding a union even if the discussions take place during working time.

Thus, the judge reasoned that Johnson's conversations about the Union on worktime were lawful. The judge further reasoned that the Respondent's reliance on its invalid rule and unlawful warning of 5 May caused the discharge to be unlawful. Additionally, pointing to his finding of an unlawful interrogation of Johnson and Johnson's being "singled out" for restrictions, the judge found Johnson's discharge violative of Section 8(a)(3) and (1) of the Act.

3. In analyzing the judge's findings with regard to the Respondent's rule, its 5 May warning to Johnson, and its discharge of Johnson, we begin with the following.

When faced with a union organizing campaign an employer may not for *union* reasons promulgate a no-solicitation and/or no-distribution rule or place other restrictions on employees. Nonetheless, during the union campaign, an employer maintains a legitimate interest in preserving production and discipline.[6] When an employer adopts a rule during a union campaign, it does not automatically follow that the rule is invalid.[7] If the employer has acted for legitimate business interests—rather than for union reasons—its promulgation of a rule cannot be deemed unlawful.

With the aforementioned observation in mind, we cannot find that the rule announced to Johnson was invalid. As the judge noted, the restrictions and the wording of the 5 May warning letter were presumptively lawful.[8] Substantial evidence indicates that Capece had been informed that production problems were being caused by employees leaving their worksites to talk with other employees during production time. There is no evidence of union animus.[9]

In fact, it is significant that Capece emphasized to Johnson that solicitation and distribution were permissible on the employee's own time. Certainly Capece's assurances that Johnson could pursue his union activities when not working suggest that the Respondent was not acting for unlawful reasons. Accordingly, based on the above, we find that the restrictions announced to Johnson on 5 May and the accompanying warning were valid and based on legitimate business considerations.[10]

We further find that Johnson was discharged for failing to abide by the Respondent's reasonable requirement that he solicit and/or distribute literature before and after worktime, during breaks, or during lunch. In this regard, the judge's statement that, absent a valid no-solicitation rule, "employees are protected in their discussions regarding a union" during working time is far too broad. If the judge is correct, employees could, absent a valid rule, discuss during working hours union activities at length and with impunity, ignore legitimate production requirements, and all the while be protected by the Act. Certainly the Act was not intended to mandate such a result. Rather, under the Act, an employer may not for union reasons or in a disparate manner penalize an employee for discussing the union during worktime. But, as previously discussed, an employer may insist in a nondiscriminatory manner that employees fulfill their legitimate job responsibilities and maintain production. Here the Respondent did just that. On 5 and 12 May, Capece admonished Johnson to use his own time for union activities. Capece's statements contained no unlawful threats and emphasized that Johnson

[5] The judge deemed the restrictions to constitute a no-solicitation rule. The record indicates that Johnson both solicited employees and distributed union literature to employees.

[6] As the Court stated in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945), "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time."

[7] See, e.g., *Permian Corp.*, 189 NLRB 860 (1971).

[8] In this regard, see *Our Way, Inc.*, 268 NLRB 394 (1983).

[9] We have previously found the 5 May "interrogation" was noncoercive and not violative of the Act.

[10] The judge relied on *William H. Block Co.*, 150 NLRB 341 (1964), to support his finding that the Respondent had promulgated a no-solicitation rule for unlawful reasons. *Block* is distinguishable. In *Block* it was found that the rule was not necessary to maintain production and discipline and that it was not promulgated in furtherance of an employer's legitimate interest of serving production, order, and discipline. In the instant case, however, it is well documented in the record that the Respondent was reacting to problems caused by employees leaving their worksites and interfering with other employees.

Our dissenting colleague, as did the judge, finds support for a violation in the Respondent's allegedly having singled out Johnson for restrictions. Capece admitted that he made no general announcement regarding solicitation. Capece was aware that there had been other instances (i.e., not involving Johnson) where employees had improperly left their work stations and engaged in needless talking. However, Capece also testified that in early 1982 he was attempting to curb all such unauthorized breaks. Accordingly, Capece's warnings to Johnson were not so much an implementation of a new rule but rather part of Capece's overall efforts to improve production.

was free to use his own time for union activities.[11] Nonetheless, Johnson persisted in engaging in union activities during worktime. In these circumstances, we find that Johnson was discharged for failing to abide by a requirement that he reserve worktime for work. The General Counsel did not establish that the Respondent discharged Johnson for union reasons. We shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, concurring in part and dissenting in part.

I agree with my colleagues' finding that the Respondent did not violate Section 8(a)(1) by interrogating employee Johnson; however, I disagree with their findings that the Respondent placed valid restrictions on union solicitation and lawfully issued warnings to and discharged Johnson.

With respect to the alleged interrogation, the judge found that Production Foreman Capece called Johnson into his office on 5 May 1982 and stated:

> Paul, I've been told by several people that you're engaging in Union activities here at the plant. You're passing out Union literature. I don't particularly sympathize with you, but I don't have anything against it. You can do that. But you've got to do it during the times that I specified, and I specified the times . . . before work, after work, during break, during lunch. And he could do so in the plant. . . . I wrote him up, gave him the opportunity to sign it; he refused to sign it. I said, "Okay, Paul. Go back to work."

This conversation lasted for approximately 3 minutes. Johnson's only response was to refuse to sign the warning.

The judge, citing *Continental Bus System*,[1] found that Capece's reference to Johnson's union activities constituted an attempt to engage in unlawful interrogation because such a statement "begs a reply." I disagree. In *Continental Bus System*, the manager came to the employee at his workplace and told the employee, "I heard that you was getting people signed up for the union." The employee then invited the manager to have coffee with him in the cafeteria, where the employee told him he was not signing people up for the union. The manager in that case had no discernible purpose for remarking on the employee's union activity and, in such circumstances, it is obvious that the remark seeks an answer from the employee—an answer which the manager in *Continental Bus System* got. Here, by contrast, Capece had a purpose in mentioning Johnson's union activities: he wanted to restrict the activities to certain time periods. The purpose of the meeting was to announce the restriction, rather than to encourage Johnson to discuss his activities. Indeed, it appears that no answer was sought or received from Johnson and the meeting was over in a very short time. I, therefore, agree with my colleagues' conclusion that Capece's remarks did not constitute an unlawful interrogation.[2]

With respect to the warning and discharge of Johnson, the judge found that both actions violated Section 8(a)(3) because they were based on an invalid and unlawful rule restricting union activities. My colleagues find the rule was valid and therefore all actions taken with respect to it are lawful. I agree with the judge's analysis of the rule.

The judge found that the Respondent's 5 May warning to Johnson announced a rule restricting union activity which, standing alone, was presumptively valid. The warning stated:

> You are hereby warned that any union activity you are engaged in can not be done during working hours. Can only be accomplished during breaks, lunch, before and after production.

However, he concluded that this presumption of validity was rebutted on the following grounds. The Respondent had no previous written or oral rule dealing with solicitation or distribution and it is undisputed that employees routinely discussed any subject matter while working. No general announcement of the 5 May rule was ever made and there is no evidence that it was communicated to anyone other than Johnson, even though Capece testified that he had problems with other employees wandering away from their work stations during the same time period. Finally, the rule was announced to Johnson immediately after he began to handbill for the Union.

On this evidence, the judge was persuaded that the purpose of the rule was to defeat the Union's organizational drive and to interfere with and restrain employees in the exercise of their Section 7 rights. I also am persuaded.

The majority asserts that when an employer adopts a rule during a union campaign, it does not

[11] Again, there is no evidence of union animus.

[1] 229 NLRB 1262 at 1265 (1977).

[2] I disagree, however, with their reliance on Johnson's position as an "open and active Union supporter" in determining the lawfulness of this interrogation. See my dissenting opinion in *Rossmore House*, 269 NLRB 1176 (1984).

automatically follow that the rule is invalid; that here the Employer had a legitimate business reason for promulgating the rule because production problems were being caused by employees leaving their workplaces to talk with other employees during production time.

Regardless of whether the timing of a rule automatically determines its validity, the evidence in this case demonstrates that there was no legitimate business purpose behind the rule. If the Respondent created the rule out of a genuine concern about disruption of production, why did it inform only one employee of the rule? It is undisputed that the rule set out in the 5 May warning to Johnson was never posted in the plant or orally conveyed to any other employee even though the Respondent had been informed that other employees were leaving their work stations. The timing of the rule must be considered in the context of its singular enforcement. In a situation where, as here, there has never been a rule on solicitation and the first such rule is communicated to and enforced against only one employee immediately after the respondent learned of his union activities, the inference is inescapable that the respondent's purpose in establishing the rule is to interfere with employees' Section 7 rights.[3]

Given the finding that the no-solicitation rule was unlawful, it follows that the Respondent's discharge of Johnson for violating the rule is also unlawful. On 26 May Johnson, during his production time, engaged another employee who was on break in a 3-minute conversation about the Union. On learning of this conversation Capece discharged Johnson for a "flagrant violation" of the 5 May rule against solicitation. The judge found it was undisputed that employees freely talked to one another on any subject matter while they were engaged in production. In these circumstances and in the absence of a valid no-solicitation rule, the judge concluded that the Respondent had no lawful basis for discharging Johnson. In this connection, the judge found that Johnson's union activities were a motivating factor in the decision to discharge him and that the Respondent's stated reason for the discharge—violation of the 5 May rule—was a pretext. He concluded that the evidence showed only one reason for discharge—retaliation for union activity. I agree.

Contrary to my colleagues, I do not believe that the finding of a violation here indicates that employees could, absent a valid rule, discuss during working hours union activities at length and with impunity, ignore legitimate production requirements, and all the while be protected by the Act. The judge limited his decision to the circumstances of this case. He specifically relied on the brevity of Johnson's conversation with an employee who was not working, the absence of evidence that the conversation disrupted anyone's work, and the accepted frequency of such conversations between employees while they were working.

The simple fact is that the evidence shows that the Respondent's discharge of Johnson, like its 5 May warning to him, bore no relation to a concern for efficient production or discipline of the work force. It did not bother to discharge or in any way discipline other employees who talked during their worktime, displaying slack discipline or inefficient production to the same degree as Johnson. Only Johnson drew the Respondent's attention, and the only difference between Johnson's conversations and those of other employees was Johnson's union advocacy.

The Respondent's actions, therefore, amount to a classic example of selective discipline in retaliation for union activities. I would uphold the judge's decision and find a violation of Section 8(a)(3) and (1) of the Act.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This matter was tried before me on March 3, 1983, at Millen, Georgia. The hearing was held pursuant to a complaint and notice of hearing issued by the Regional Director for Region 10 of the National Labor Relations Board (Board), on November 4, 1982,[1] and is based on a charge filed on September 30, by Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC (Union). The complaint in substance alleged that Brigadier Industries Corporation (Respondent) interrogated its employees concerning their union membership, activities, and desires in violation of Section 8(a)(1) of the National Labor Relations Act and that Respondent issued a warning to its employee, F. Paul Johnson, on May 5, and subsequently on May 26 discharged and thereafter failed and refused to reinstate Johnson because of his membership in and activities on behalf of the Union, and because he engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection in violation of Section 8(a)(3) and (1) of the Act. The issues herein were joined by Respondent's answer of November 8, wherein it denied the commission of the alleged unfair labor practices.

On the entire record made in this proceeding, including my observation of each witness who testified herein,

[3] Nor can the assurances to Johnson that he could pursue union activities when not working overcome this inference. The Respondent's choice of Johnson as the only employee to receive notice and enforcement of the rule remains unexplained.

[1] All dates hereinafter are 1982 unless otherwise indicated.

and after due consideration of briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondent, a South Carolina corporation, maintained an office and place of business at Millen, Georgia, where it is engaged in the manufacture, sale, and distribution of mobile homes. During the year preceding the issuance of the complaint and notice of hearing, Respondent sold and shipped from its Millen, Georgia plant finished products valued in excess of $50,000 directly to customers located outside the State of Georgia.

It is admitted, and I find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a plant at Millen, Georgia, where it manufactures mobile homes. Respondent, at material times herein, employed approximately 170 to 180 employees which it classified as either assemblers or installers. The interior of Respondent's plant is open space with a glass-enclosed elevated office for the production foreman and his supervisor. The elevated office provides an unobstructed view of the entire plant. At material times herein, the production schedule of Respondent was eight mobile homes per day. There are 18 production stations in the plant where various portions of the construction of the mobile homes are accomplished. There are 13 mobile homes in the plant at all times in various stages of completion. Each mobile home is scheduled in each of the 18 stations for approximately 55 minutes. The work in each station must be accomplished before the mobile home can be advanced to the next station.

Production Foreman Jonathan B. Capece, at material times herein, was in charge of five departments or one-half of the plant. Capece's responsibility included the plumbing, electrical, metal, shingling, and finish departments. The functions performed by each of the departments under Capece's supervision related to the name of the department. The finish department completed the home, cleaned it out, and prepared it for shipping. Capece's responsibility was to see that there was an orderly flow of materials and parts into the plant and that the materials were properly utilized, within the time frames allowed, to produce the required production schedule. Employees are moved from one work area to another as dictated by time and work assignments. Capece, at material times herein, was in charge of interviewing, hiring, counseling, utilizing, and disciplining employees for the half of the plant he had responsibility for. Capece interviewed and hired Johnson in March. Capece also made the decision to terminate and terminated Johnson on May 26.

The Union commenced an organizational campaign at Respondent in either late April or early May and held its first union meeting on May 4. Respondent admittedly had knowledge of the Union's campaign and of Johnson's involvement in the campaign by May 5.

B. *The Issues*

The case presents a number of questions which have been thoroughly litigated. These questions or issues are generally summarized as follows:

1. Whether Respondent on or about May 5, acting through Prodcution Foreman Capece, interrogated its employee Johnson concerning his union membership, activities, and desires.

2. Whether Respondent about May 5 informed its employee Johnson that its employee Rule 1(c) prohibited union solicitation or other legitimate union activity during working hours except during breaks, lunch, before and after production.

3. If the issue in item 2 is resolved that Respondent did so inform its employee Johnson, did Respondent do so for the purpose of defeating union organization among its employees.

4. Whether Respondent about May 5 issued a written warning to its employee Johnson, and whether thereafter about May 26 discharged him because of his membership in and activities on behalf of the Union and because he engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection in violation of Section 8(a)(3) and (1) of the Act.

C. *The Facts*

Johnson commenced work for Respondent in March in the metal department. Johnson testified he was shown a copy of "Employee Rules and Regulations"[2] (G.C. Exh. 7) when he was interviewed for his employment with Respondent. Johnson testified he had never seen the rules posted at the plant, and he never had anyone from management talk to him about the rules after his first day of employment. Johnson received a 15-cent per hour wage increase after he had worked for Respondent for 30 days. Johnson asserts he requested, and was granted, a transfer from the metal department to the shingling department, and after being in the shingling department for 2 weeks, he was granted a $1-per-hour wage increase.

Johnson stated he was actively involved in the Union's organizing campaign at Respondent. According to Johnson, the campaign commenced in late April or early May. Johnson attended the union meetings, passed out union literature, and solicited and encouraged fellow employees to sign union authorization cards. Johnson stated he persuaded employees to sign cards for the Union. Johnson commenced to pass out union literature at Re-

[2] The rules reflect that they became effective on June 1, 1978.

spondent's facility immediately after the Union's first meeting which was held on May 4. Johnson stated he handbilled for the Union 7 days a week, five times per day thereafter; namely, before and after work, at the morning and afternoon breaks, and at lunchtime. Johnson asserted he offered union literature to his immediate supervisor, Capece, as well as to Production Manager Aaron and General Manager Dempsey.

On May 5, Johnson testified he was called into Capece's office where Capece and Production Manager Aaron were present. Johnson asserts Capece told him, "I hear you're passing out Union literature." Johnson told Capece it was none of his business what he did with his time. Capece responded, "I guess I'll rephrase that . . . I hear you're passing out Union literature on company time." Johnson denied that he was. Capece stated, "Well, I have nothing agai.st what you're doing, as long as you do it on your own time and not during hours of production, or I'll have to take further action." Johnson told Capece he did not expect anything more than that. Johnson testified he was not given any written warning at the time.

Johnson reported to work at 7:30 a.m. on May 26, and was told by Capece that there was a shortage of personnel that day. Capece told Johnson to report to the metal department for work. Johnson stated he was assisting metal department employee Kenny Binds place a roll of sheet metal on a crane at approximately 9 a.m. when employee Wayne McMillan approached and asked what was happening. Johnson told McMillan not much was happening. Johnson and McMillan talked for a minute and, after the metal was hoisted up in place on the mobile home, Johnson climbed back up on the scaffold and continued to perform his assigned work. Johnson testified he never stopped working while he spoke with McMillan, and he asserts the Union was not mentioned in the conversation. Johnson stated no one else was present at the time of his conversation with McMillan.

Johnson testified that following the 10 o'clock morning break, Capece approached him and stated, "Remember that conversation we had a couple of weeks back about Union activity." Johnson told Capece he remembered. Capece replied, "Well, I have a sworn statement from an employee and a witness who say that you tried to get him to sign a Union card during working hours." Johnson testified he asked Capece what employee had told him that, and Capece replied that Wayne McMillan had told him. Johnson told Capece that McMillan was lying to which Capece responded, "I can't help that. As of now, you are terminated." Johnson testified Capece allowed him to get his personal belongings and then escorted him out of the area. Johnson asked for his paycheck, and he and Capece went to the office where Johnson was given one of the paychecks he was due. Johnson testified that as he was leaving the plant it was raining.[3] Johnson testified he stopped by a mobile home to place his check in his backpack so that it would not get wet and, while doing so, he attempted to tell some of his fellow employees what had happened. Johnson testified Capece grabbed him by the arm and stated, "Come on, let's go. You can tell them about that at the Union meeting."

Johnson testified he never at any time on May 26 interfered with any of his fellow employees' work assignments. Johnson asserts employees talked all day as they performed their work, and they talked about politics, marriage, diets, religion, and everything else. Johnson testified he was never told at any time that he could not talk with his fellow employees.

It is undisputed that after Johnson was terminated on May 26, he received two separation notice letters. One of the letters was worded slightly different from the other (G.C. Exhs. 8 and 11). Capece explained the reason the second separation notice letter was sent to Johnson was that there was some question in his (Capece's) mind as to whether the first letter clearly stated the violation, and he wanted the reason to be clear.[4]

General Foreman Capece testified that after he hired Johnson he had a number of work-related problems with him. Capece testified that approximately 3 weeks after Johnson was hired his group leader came to him (Capece) and told him he was dissatisfied with Johson's time, but not quality, work performance. Capece at that time decided to assign Johnson as a general helper in the metal department.

Capece testified that in late March he had to speak with Johnson about being out of his assigned work area. Capece asserted Johnson was working on his personal roller skates. Capece asked Johnson about the matter, and Johnson told him he had completed his work assignment. Capece informed Johnson his job was not a piecerate assignment and, if he had nothing else to do, to clean up around his area. Capece made a written memorandum of the conversation (R. Exh. 3) but did not show it to Johnson.

Capece testified he scheduled Johnson to work on Saturday, May 1, but Johnson did not show for work. Capece counseled Johnson about his not showing for work and, according to Capece, Johnson told him he had personal business to take care of that Saturday. Capece testified he prepared a memorandum on the matter (R. Exh. 4) and asked Johnson to sign it. Capece stated Johnson refused to do so.[5] Capece asserted that Johnson wandered away from his work area in late April and early May.[6]

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[3] United States Government Weather Service Record Keeper Kermit Chance testified that his records showed no measurable precipitation fell in Millen, Georgia, on May 26. Chance acknowledged it was quite common, however, for it to rain at one particular location and not at another. The Government's measuring equipment is located at Magnolia Springs, Georgia, which, according to Chance, is about 5 miles from Respondent's plant. Chance impressed me as a credible witness, and his records appeared to be in order. I am persuaded, however, that neither his testimony nor records established that it did not in fact rain at Respondent's plant in Millen, Georgia, on the date in question.

[4] The separation notice letter (R. Exh. 11) stated the circumstances of Johnson's separation as follows:

> Employee was terminatd for interfering with fellow employees and interrupting production during working time. Employee has been previously warned on May 5, 1982. This was a violation of company rule 1-C.

[5] Capece acknowledged that he had employees on other occasions not show up for work and he gave them warnings also.

[6] Capece acknowledged Respondent had problems with other employees wandering away from their work area during this particular timeframe for cigarettes and other reasons.

Capece stated he spoke in his office with Johnson on May 5. Capece testified that prior to calling Johnson to his office, Johnson's group leader had asked him to remove Johnson from the metal department because Johnson could not keep up and was causing problems in that respect. Capece testified he had heard from a couple of the group leaders that Johnson had been engaging in union activities. When Johnson arrived in Capece's office, Capece told him to sit down and then stated:

> Paul, I've been told by several people that you're engaging in Union activities here at the plant. You're passing out Union literature. I don't particularly sympathize with you, but I don't have anything against it. You can do that. But you've got to do it during the times that I specified, and I specified the times . . . before work, after work, during break, during lunch. And he could do so in the plant.[7] . . . I wrote him up, gave him the opportunity to sign it; he refused to sign it.[8] I said, "Okay, Paul. Go back to work."

Capece testified his May 5 conversation with Johnson did not last more than 3 minutes because he did not like to keep his employees away from their work assignments.

Capece stated that two of his group leaders told him on May 12 that they did not want Johnson wandering around in their area of the plant, that he was passing out union literature. Capece testified:

> So at the first opportunity I got, so as not to embarrass Paul, I just mentioned to Paul in passing—made no record of it, it was just a verbal warning. I said, "Paul, I've been told that you're passing out Union literature in the plant. Remember the rules that we set aside on May 5? You will only do it before working hours, during break, during lunch, and after working hours." And he said, "Right. That's the only time I'm doing it." I said, "Fine, Paul. Thank you." And that was the end of it.[9]

Capece testified Johnson did not like working in the metal department, and his group leader wanted to get him out of his department. Capece testified he discussed the possibility of a transfer for Johnson with him but tried to discourage him from transferring to the shingle department because he thought Johnson was physically too large to be a shingler. Capece informed Johnson he would need to speak with General Foreman Aaron regarding a transfer. Capece testified Johnson was allowed to transfer to the shingle department; and approximately 2 weeks after his transfer, he was granted a wage increase to $4.50 per hour. Capece testified Johnson's wage increase became effective approximately May 24.

Capece testified that in the latter part of May, he gave Johnson a warning (R. Exh. 6) because Johnson did not complete a job assignment on time. Capece testified Johnson had been assigned to the metal department at the time of the warning because Respondent had more homes that called for metal roofs than shingle roofs. Capece testified one of his group leaders, A. D. Pierce, told him that Johnson had refused to do a particular assignment because he was a shingler. Capece confronted Johnson about the matter, and Johnson denied refusing to perform any assignment. Capece testified he asked Johnson to sign the warning given in late May, but he declined to do so.

Capece testified that on the first day Johnson made $4.50 per hour, he checked his work and it did not quite meet the timeframe requirements for an average shingler; therefore, he spoke with Johnson and prepared a written memorandum regarding his visit with Johnson. Capece was not sure whether he showed the memorandum to Johnson or not. Respondent's counsel at trial called to Capece's attention that the memorandum (R. Exh. 7) had a written notation "refused to sign on" it. Capece stated, "Well, I probably did show it to him, if that's the case. I just—you know. I don't particularly remember this one."[10] Capece testified that later that same day, May 25, he gave Johnson a second warning (R. Exh. 8) for not completing an assigned task as quickly as Capece thought it should have been completed. Capece testified Johnson agreed it took him too long to complete the assignment. Capece testified he asked Johnson to read and sign the written warning, but Johnson declined to do so.

Capece testified he again assigned Johnson to work in the metal department on the morning of May 26. Johnson's assignment was to assist another employee to install metal roofs on houses. The job assignment entailed the use of a dolly to move the metal roofing material into the area and then place it on the roof by a chain hoist where the material was rolled out and stapled in place.

Capece testified that at approximately 10 a.m., Line Foreman Randy Brogsdon came to him and told him a couple of employees had informed him (Brogsdon) that one of them had been approached by Johnson at approximately 9:30 a.m. on the floor of the metal department and asked if the employee wanted to sign a union card and attend a union meeting. Capece inquired of Brogsdon who the two employees were, and Brogsdon told him Wayne McMillan and Robert Oglesby. Capece testified:

> So I went and I got Mr. Oglesby, and I asked him—I just said, "tell me what happened." And he told me what happened. Then I went and got Mr. Wayne McMillan and asked him what occurred, and he told me what occurred. And as far as I was concerned, that was a flagrant violation of my instructions to Mr. Johnson, in writing on May 5 and my verbal warning on the 12th of May; and when I

[7] At a different point in his direct testimony, Capece stated he told Johnson he did not care about his union activities, but that he was there to see that eight mobile homes were built per day.

[8] The written warning dated May 5, stated: "You are hereby warned that any union activity you are engaged in can not be done during working hours. Can only be accomplished during breaks, lunch, before and after production." (R. Exh. 5).

[9] Johnson testified he could not recall any such conversation.

[10] Capece acknowledged on cross-examination that he wrote "refused to sign" on the warning slips at the time they were subpoenaed by counsel for the General Counsel.

asked the two men if they would swear to that, they said yes.[11]

Capece testified he confronted Johnson with the situation. Johnson denied the conversation had taken place. Capece told Johnson, "Well, Paul, these two guys swear you did it, and that's it. You're terminated. So just gather up your personal belongings and go." Capece escorted Johnson to the timeclock and then to the front office where he was given a previous workweek's paycheck. Capece thereafter escorted Johnson outside the plant. Johnson stopped at a mobile home and threw his backpack into it. Capece told Johnson to leave the premises. Johnson asked Capece if he was threatening him, and Capece told him that he would not think of doing so and that he could go then or Capece would call the sheriff. Johnson told those in the mobile home he had been fired. Capece testified he told Johnson that he did not need an audience to go. Capece testified Johnson then left the premises.

D. *Credibility Resolutions and Analysis*

On the status of this record, Johnson was the most visible and vocal supporter of the Union. It is undisputed that Respondent knew of Johnson's support for the Union. Johnson attended a May 4 meeting of the Union and immediately thereafter commenced to distribute prounion literature at Respondent's facility. Johnson also commenced to solicit his fellow employees to sign up in support of the Union. It is likewise undisputed that Capece spoke with Johnson on May 5, at least in part, about his union activities. There is a conflict in the testimony of Capece and Johnson as to what was said between them at their May 5 meeting. Capece impressed me as an individual who desired to carefully and truthfully state what had transpired. The written memorandum of the May 5 meeting (R. Exh. 5) in my opinion tends to support Capece's version of what was said at this meeting with Johnson. Johnson's testimony regarding this meeting, as well as other successive events, appears to me to have been designed to strengthen his own position by embellishing events favorable to him and by attempting to minimize those which were adverse to him. In contrast, Capece appeared to testify in a candid and truthful manner.

Turning now to examine the legal import of what was said on May 5, I am persuaded that Capece attempted to unlawfully interrogate Johnson when he stated to him, "Paul, I've been told by several people that you're engaging in union activities here at the plant. You're passing out union literature." A comment of this nature has been found by the Board to constitute an attempt to engage in unlawful interrogation because such a statement "begs a reply." See *Continental Bus Systems*, 229 NLRB 1262 at 1265 (1977). I therefore conclude and find that the statement Capece acknowledged he made to Johnson on May 5 constituted a violation of Section 8(a)(1) of the Act as alleged at paragraph 7 of the complaint.[12]

I am persuaded that Respondent issued a written warning to Johnson on May 5 regarding his having engaged in union activities. The wording of the warning (R. Exh. 5 and as set forth at fn. 8 of this decision) does not appear to be, in and of itself, unlawful. The specific restrictions placed on union solicitation by Capece and his oral comments about the restrictions, standing alone, appear to be presumptively valid. Such a presumption, however, is rebuttable and as such, an issue then arises regarding Respondent's purpose in announcing to Johnson the restrictions that it did. I am persuaded that Respondent was unlawfully motivated in announcing the restrictive rule to Johnson. Respondent communicated the instant rule orally during an unlawful interrogation of a known union adherent whom it later discriminatorily discharged. Prior to this announcement by Capece, Respondent had no written or oral rule dealing with solicitation or distribution by its employees. No general announcement of the instant rule was ever made to any employee other than Johnson. The purpose of the rule could not have been to preclude work disruption because Capece testified he had problems with other employees wandering away from their work stations during this period of time, yet he announced the rule to union adherent Johnson only. The announcement of the rule came immediately after Johnson commenced to handbill for the Union.[13] I am persuaded that the purpose of the rule was to defeat the Union's organizational drive at Respondent and to interfere with and restrain its employees in the exercise of their Section 7 rights and, as such, the rule was unlawful and invalid. See *Wm. H. Block Co.*, 150 NLRB 341 (1964), and *American Commercial Bank*, 226 NLRB 1130 at 1131 (1976). Accordingly, I conclude, and find, that Respondent violated Section 8(a)(3) and (1) of the Act when it issued its employee Johnson a warning on May 5, based on its invalid and unlawful rule.

I credit Capece's testimony that he issued various warnings to Johnson during his term of employment with Respondent. In so crediting Capece's testimony, I am not unaware that Capece gave somewhat conflicting testimony regarding when he wrote on the warnings the words "refused to sign." The warnings, except for the

[11] Robert Oglesby testified he overheard a conversation between Johnson and McMillan on May 26. According to Oglesby, Johnson asked McMillan about a union meeting and about signing a union card. Oglesby asserted he was waiting his turn to use a table saw at the time he overheard the conversation. Oglesby stated the conversation between Johnson and McMillan took a minute or two.

McMillan testified Johnson stopped him as he was going to the water fountain and asked if he was going to a union meeting that night and if he had signed a union card and whether he wanted to sign a union card. McMillan testified he was not working at the time he spoke with Johnson. McMillan estimated the conversation with Johnson lasted 2 or 3 minutes. Both Oglesby and McMillan testified they told Capece about the conversation with Johnson.

[12] The May 12 conversation between Capece and Johnson was not alleged to have violated the Act in any manner; accordingly, I made no findings with respect thereto.

[13] Respondent contends that promulgation of a rule at the time union solicitation starts does not give support for a finding that it was adopted for a discriminatory purpose. Respondent relies on, among other cases, *Star-Brite Industries*, 127 NLRB 1008 (1960), to support such a proposition. Respondent's reliance on *Star-Brite* is misplaced inasmuch as the Board specifically overruled *Star-Brite* in that respect in its decision in *Wm. H. Block Co.*, 150 NLRB 341 (1964).

one given on May 5, in my opinion, add very little to the instant case other than that they may demonstrate that Johnson was not the most exemplary employee

I credit Capece's testimony that McMillan, when asked, told him on May 26 that Johnson had asked him about a union meeting and about signing a union card. I credit McMillan's testimony that Johnson asked him about the Union on May 26. McMillan impressed me as a truthful witness. McMillan's testimony was corroborated by that of Oglesby. I credit Capece's testimony regarding his confrontation with Johnson on May 26 about the matter and of his discharging Johnson.

I am persuaded that Johnson's discharge violated Section 8(a)(3) and (1) of the Act. Johnson was discharged for allegedly violating Respondent's no- solicitation rule announced on May 5 and for insubordination.

In the absence of a valid no-solicitation rule as in the instant case, employees are protected in their discussions regarding a union even if the discussions take place during working time. It is undisputed on this record that the employees freely talked about any subject matter. I find under the circumstances of this case that Johnson could and did lawfully speak with McMillan about the Union. The conversation lasted, at most, 3 minutes and there is absolutely no showing on this record that there was any disruption of work by anyone in Johnson's speaking with McMillan. As set forth elsewhere in this decision, the no-solicitation rule was invalid; therefore, Respondent's reliance, in part, on its unlawful May 5 warning as a basis for discharging Johnson causes the discharge to likewise be unlawful. In addition thereto, this record clearly establishes that Johnson's union activities were known to Respondent; he was unlawfully interrogated and disciplined within a day of his first handbilling for the Union; and he was singled out to have announced to and applied against him a previously unannounced no-solicitation rule. I am persuaded by the above findings and conclusions that the General Counsel has established a prima facie showing that a "motivating factor" in Respondent's decision to give a warning to Johnson on May 5, and to discharge him on May 26, was his protected conduct. I conclude that the reasons offered by Respondent for its actions were pretextual and, as such, I find Respondent failed totally in its efforts to demonstrate that the same actions would have been taken against Johnson even in the absence of the protected conduct. See *Wright Line*, 251 NLRB 1083 (1980). In summary, I am fully persuaded that only one valid reason existed for the discharge of Johnson, and that reason was retaliation against him because of his union activity and, as such, Respondent violated Section 8(a)(3) and (1) of the Act as alleged in the complaint when it discharged Johnson on May 26.

CONCLUSIONS OF LAW

1. Brigadier Industries Corporation is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when its general foreman, Jonathan B. Capece, about May 5 interrogated its employees concerning their union membership, activities, and desires.

4. Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by issuing about May 5 a written warning to its employee F. Paul Johnson.

5. Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act by discharging its employee F. Paul Johnson about May 26 and thereafter failing and refusing to reinstate him.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully reprimanded and discharged its employee F. Paul Johnson, I shall recommend that it be ordered to offer Johnson full reinstatement to his former position or substantially equivalent position of employment without prejudice to his seniority or other rights, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him with interest. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest shall be computed as proscribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Further, it is recommended that Respondent expunge from its files any references to the written warning given on May 5, or to the May 26 discharge of F. Paul Johnson, and to notify him in writing that this has been done, and that evidence of the unlawful written warning will not be used as a basis for future personnel actions against him. See *Sterling Sugars*, 261 NLRB 472 (1982). It is recommended that Respondent post the attached notice.

[Recommended Order omitted from publication.]